IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1180 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BALVANTVBHAI GOPALBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1180 of 1994

MS BANNA S DUTTA for the appellant

Ms. Hansa Punani, APP, for Respondent

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE M.C.PATEL

Date of decision: 02/05/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. Appellant, the husband of the deceased Ramilaben, in this appeal filed under Section 374 of the Code of Criminal Procedure ('Code' for short), has questioned the legality and validity of the judgment and order dated October 29, 1994 passed by the 2nd Additional Sessions Judge, Bharuch, in Sessions Case No.217 of 1993, by which the appellant came to be convicted under Sections 302 and 498-A of the Indian Penal Code and sentenced to undergo R.I. for life and fine of Rs.500 in default R.I. for six months for the offence under Section 302 of the Indian Penal Code and R.I. for one year and fine of Rs.200 in default R.I. for three months for the offence under Section 498-A of the Indian Penal Code, ('IPC' for short).

2. Briefly stated, the prosecution case is as under: Deceased, Ramilaben, was married with the appellant prior to six years from the date of occurrence of the incident which had taken place on June 10, 1993 at village Kharchi-Boridra, Taluka: Zaghadiya. The appellant and the deceased were staying with the mother of the appellant, Mangiben. After two years of the marriage life, the appellant had started illtreating the deceased and had driven her out of matrimonial home. The parents of the deceased had requested the appellant and his mother to call back the deceased to the matrimonial home, but the request was not acceded to by the appellant and his mother. The deceased had initiated maintenance proceeding in the Court of the learned Judicial Magistrate, First Class, Ankleshwar, being Misc. Criminal Application No.8 of 1991 claiming maintenance for herself and her minor son. During pendency of the above maintenance proceeding, the appellant and his elder brother, Narsinh Gopal, had given an undertaking before the Court of the learned Judicial Magistrate, First Class, that they would not illtreat her nor cause any mental or physical cruelty to the deceased and, thereafter, they had taken the deceased to her matrimonial home.

3. After the deceased was taken to her matrimonial home, the appellant again had started illtreating her. Prior to the day of the incident, i.e. on June 9, 1993, the appellant had demanded money from the deceased to buy liquor, and, when the deceased had refused to pay money, the appellant had illtreated her and had beaten her and had given fist blows which had landed on the mouth of the deceased as a result of which two front tooth of the deceased had become loose. On the next day, i.e. on June 10, 1993, around 10 a.m., the mother-in-law of the

deceased, Mangiben, had caught hold of her whereas the appellant had poured kerosene on her and had set her ablaze. Due to raising of shouts, the neighbours and the elder brother of the appellant had rushed to the house of the appellant and had tried to save the deceased by pouring water on her. As the deceased had sustained serious burn injuries, she was removed by her in-laws and the neighbours to Jayaben Mody Hospital at Ankleshwar where she was admitted as indoor patient. Ramesh Narshi, son of the elder brother of the appellant, had gone to village Kosamha to inform the brother of the deceased, P.W.3, Maganbhai Gumanbhai Patel. P.W.3, Maganbhai, had immediately gone to Jayaben Mody Hospital at Ankleshwar around 8 p.m. where he saw that the deceased was surrounded by her in-laws. P.W.3, Maganbhai, had asked her inlaws to go out of the room. The deceased had narrated to P.W.3, Maganbhai, how the incident had taken place and how she was set on fire by the appellant and his mother. She also narrated the incident which had taken place on the previous day of the incident, i.e. on June 9, 1993. She had also told her brother that, after she had sustained burn injuries, she was brought to the hospital by her in-laws.

4. P.W.3, Maganbhai, had gone to GIDC Police Station, Ankleshwar, to lodge a complaint against the appellant and his mother around 10 p.m. which was ultimately transferred to Zaghadiya Police Station under whose jurisdiction the offence had taken place. The First Information Report lodged by P.W.3, Maganbhai, was registered as CR No.I-140 of 1993 of Zaghadiya Police Station initially for the offences punishable under Sections 323, 498A, 307 and 114 of the Indian Penal Code. The said First Information Report was recorded by P.W.6, Police Head Constable, Bhattbhai Rupalbhai, of GIDC Police Station, Ankleshwar. P.W.6, Bhattbhai, had sent yadi to the Executive Magistrate, to record dying declaration of the deceased who was admitted in Ankleshwar Hospital. The said yadi was received at 12.05 a.m. by P.W.4, M.R. Vasava, who was at the relevant time posted as Deputy Mamlatdar-cum-Executive Magistrate, at Ankleshwar, on June 11, 1993. P.W.4, M.R. Vasava, had gone in a police jeep to Jayaben Mody Hospital at Ankleshwar and reached there around 12.20 a.m. He had contacted the Doctor on duty at the hospital and ascertained about the physical condition of the deceased and on being satisfied that the deceased was conscious and in a fit state of mind to give her declaration, had started recording her dying declaration at 12.3 a.m. and completed at 12.45 a.m. On the dying declaration, P.W.4, M.R. Vasava, had also obtained endorsement of the Doctor

who was on duty about the patient being conscious and in a fit state of mind.

5. As the condition of the deceased was serious, it was advised by the Doctor at Jayaben Mody Hospital at Ankleshwar to take the deceased to the SSG Hospital, Vadodara. The brother of the deceased, P.W.3, Maganbhai, had taken the deceased to Bharuch Civil Hospital instead of SSG Hospital, Vadodara. The deceased was admitted in the Civil Hospital, Bharuch, around 5 p.m. on June 11, 1993. P.W.5, Dr. L.S.Rathod, who was on duty at the Civil Hospital, Bharuch, had asked the deceased as to how she had sustained burn injuries. The deceased had declared before P.W.5, Dr. Rathod, that she was set on fire by the appellant. P.W.5, Dr. Rathod, had noted down the history narrated by the deceased in the case papers of the Civil Hospital, Bharuch. The deceased had succumbed to the injuries on July 9, 1993 around 6.40 a.m.

6. PSI, J.K. Rana, of Zaghadiya Police Station was entrusted with the investigation of First Information Report CR No.I-140 of 1993. On June 1, 1993, he had gone to village Boridra and had drawn panchanama of place of incident and had recorded statements of witnesses. The mother of the appellant, original accused No.2, was arrested on June 11, 1993. During investigation, the appellant had presented himself before the police station and he was arrested under arrest panchanama on June 15, 1993. On the death of the deceased, PSI, Rana, had gone to the Civil Hospital, Bharuch, and held inquest of the dead body. Post-mortem of the dead body was performed by P.W.1, Dr.Meeta S. Saija, Medical Officer of Civil Hospital, Bharuch, on July 9, 1993 from 11 a.m. to 12 noon. PSI, Rana, after death of the deceased, had added Section 302 of the IPC by submitting an application before the learned Judicial Magistrate, First Class, Ankleshwar. Incriminating articles collected during investigation were sent to the Forensic Science Laboratory ('FSL' for short) for analysis. PSI, Rana had collected medical case papers from Jayaben Mody Hospital and Bharuch Civil Hospital and post-mortem notes of the deceased, and, on completion of investigation, submitted chargesheet in the Court of the learned Judicial Magistrate, First Class, Ankleshwar, which was registered as Criminal Case No.1101/93, against the appellant and the original accused No.2, Mangiben, for the offences under Sections 323, 307, 302, 114 and 498-A of the IPC. As the offence under Section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions Judge, the learned Judicial Magistrate, First Class, committed

the case to the Court of Sessions, Bharuch, where it came to be numbered as Sessions Case No.217 of 1993.

7. Charge Exh.3 was framed against the appellant and his mother, original accused No.2, for the offences punishable under Sections 498-A read with Section 34 and under Section 302 read with Section 34 of the IPC. The charge was read over and explained to the appellant and the original accused No.2 wherein they pleaded not guilty and claimed to be tried. The prosecution, in order to prove the charges framed against the appellant, examined:
(1) P.W.1. Dr. Meeta S. Saija, Exh.17;
(2) P.W.2, Dr. Haresh I. Shah, Chief Medical Officer of Jayaben Mody Hospital, Ankleshwar, Ex.20;
(3) P.W.3, complainant, Maganbhai Gumanbhai Patel (brother of the deceased) Exh.24;
(4) P.W.4, Executive Magistrate, M.R. Vasava, Exh.26;
(5) P.W.5, Dr. Laxmanbhai S. Rathod, Medical Officer of Bharuch Civil Hospital, Exh.30;
(6) P.W.6, Police Head Constable, Bhattbhai Rupabhai, of GIDC Police Station, Ankleshwar, Exh.32; and
(7) P.W.7, IO, PSI, J.K. Rana of Zaghadia Police Station.
The prosecution also produced documentary evidence such as panchanama of place of incident, Exh.10, arrest panchanama of accused No.2, Mangiben, Exh.11, inquest panchanama Exh.12, arrest panchanama of the appellant Exh.13, post-mortem notes Exh.19, medical case papers of the deceased of Jayaben Mody Hospital Exh.21, First Information Report, Exh.25, Yadi sent to the Executive Magistrate to record dying declaration of the deceased Exh.27, dying declaration of the deceased Exh.28, medical case papers of the deceased of Civil Hospital, Bharuch, Exh.31, and report of the FSL Exh.28, to prove the charge against the appellant.

8. After the evidence of the prosecution was over, the appellant and the original accused No.2 were questioned generally and their statement came to be recorded under Section 313 of the Code. The defence of the appellant and the original accused No.2 was of general denial.

9. The learned 2nd Additional Sessions Judge, on appreciation of oral as well as documentary evidence and the arguments advanced by the learned Additional Public Prosecutor and the learned advocate for the appellant, held that (i) deceased had died a homicidal death and not accidental death; (ii) the appellant had treated the deceased with cruelty by causing her physical as well as mental torture; (iii) dying declarations of the deceased

made before her brother, before P.W.5, Dr. L.S. Rathod, of Bharuch Civil Hospital and before the Executive Magistrate, Vasava, were truthful and reliable which had proved beyond doubt that the appellant had poured kerosene on the deceased and had set her ablaze and the deceased had died as a result of burn injuries received by her in the fire; (iv) the injuries sustained by the deceased due to pouring of kerosene and setting her ablaze were sufficient in the ordinary course of nature to cause her death. On the basis of the abovereferred to conclusion, the learned 2nd Additional Sessions Judge, by impugned judgment and order, convicted the appellant under Sections 302 and 498-A of the Indian Penal Code and sentenced to undergo R.I. for life and fine of Rs.500 in default R.I. for six months for the offence under Section 302 of the Indian Penal Code and R.I. for one year and fine of Rs.200 in default R.I. for three months for the offence under Section 498-A of the Indian Penal Code, which has given rise to filing of the present appeal by the appellant.

10. It may be mentioned that, by the impugned judgment and order, the original accused No.2, namely, Mangiben, mother of the appellant, came to be acquitted. The State of Gujarat has challenged the order of acquittal of the original accused No.2 by filing Criminal Appeal No.937 of 1995 and the Division Bench of this Court passed the following order on January 25, 1996.
"We have gone through the impugned judgment and order of acquittal and the R & P. Having regard to the peculiar facts and circumstances of the case, it does not appear to us that the acquittal of accused No.2, Mangiben, requires to be taken exception. In this view of the matter, leave refused. This appeal fails and is dismissed summarily."

11. Learned counsel Ms. Banna S. Dutta, appearing for the appellant and learned APP, Ms. Hansa Punani, have taken us through the entire record and proceedings of the Sessions Case. We have scanned through the entire evidence and reappreciated the oral as well as documentary evidence.

12. The learned counsel for the appellant has submitted that, as per the first version given before the Doctor on duty of Jayaben Mody Hospital, Ankleshwar, she herself had stated that she had sustained acidental burn injuries while she was working in the kitchen. It is submitted by the learned counsel for the appellant that there was conflict between her earlier version as narrated by the deceased and the subsequent dying

declaration, which raises serious doubts about the truthfulness and genuineness of subsequent dying declaration and, therefore, benefit of doubt should be extended in favour of the appellant and the appeal be allowed and the conviction and the sentence imposed on the appellant be quashed and set aside.

13. On the other hand, the learned APP, Ms. Hansa Punani, has submitted that the earlier version was not narrated by the deceased before the Medical Officer of Jayaben Mody Hospital, Ankleshwar, but her in-laws, who had taken the deceased to the said hospital, had given false history about the incident by stating that the deceased had sustained accidental burn injuries while she was working in the kitchen. The learned APP, further, submitted that the dying declarations made before the brother of the deceased, before the Doctor on duty of Civil Hospital, Bharuch, and the dying declaration recorded by the Executive Magistrate, were truthful and reliable and corroborated by the medical evidence in the nature of post-mortem notes which had shown that on the previous day of the incident the appellant had illtreated the deceased and had given fist blows as a result of which two teeth of the deceased had become loose. The learned APP has, lastly, submitted that there was sufficient evidence led by the prosecution to prove that the deceased was illtreated with cruelty and, as she had not paid money to the appellant on the previous day to buy liquor, the appellant had by pouring kerosene set her ablaze. It is, therefore, submitted that the learned 2nd Additional Sessions Judge, in the impugned judgment, had given cogent and convincing reasons based on proper appreciation of evidence and, therefore, the conviction and the sentence imposed on the appellant be confirmed and the appeal be dismissed.

14. Oral testimony of P.W.1. Dr. Meeta S. Saija, who had performed post-mortem of the deceased, had indicated that the deceased, Ramilaben, had sustained burn injuries on chest, stomach, both hands, buttocks and back. Post-mortem notes Exh.19 in the column of external injuries had shown that the deceased had also sustained burn injuries on the private part of the body. The cause of death, as shown in the post-mortem notes, was: "To my opinion, the deceased died due to septicemic semi shock following old burns". The deceased had also sustained burn injuries on June 10, 1993, and, after prolonged treatment, had died nearly after one month, i.e. on July 9, 1993. The burn injuries were so severe and deep that in spite of medical treatment, septic had developed and she died due to septicemic semi shock following old

burns. The dying declarations, of which reference would be made in the later part of the judgment, had proved that the appellant had poured kerosene on her body and set her ablaze. The burn injuries, which were sustained by the deceased, were possible if kerosene is poured from the front on the body of the deceased. The deceased had sustained burn injuries all over her body to the extent of 60 to 65% as indicated in the medical case papers of Jayaben Mody Hospital, Ankleshwar, and the case papers of the Civil Hospital, Bharuch. The burn injuries sustained by the deceased all over her body were sufficient in the ordinary course of nature to cause her death. The history narrated in the declaration made before P.W.5, Dr. Laxman Rathod, supports the prosecution case that kerosene was poured on her body and she was set ablaze by the appellant. In our view, the deceased had not sustained accidental burns but she was set ablaze after pouring kerosene by the appellant. The theory of accidental burns is clearly ruled out by the dying declarations. Therefore, the finding of the learned 2nd Additional Sessions Judge that the deceased died homicidal death due to burn injuries deserves to be confirmed.

15. The submission of the learned counsel for the appellant that the deceased herself had narrated the history before the Doctor on duty at Jayaben Mody Hospital, Ankleshwar, by stating that she had sustained accidental burn injuries while she was working in the kitchen, deserves to be rejected. The medical case papers of Jayaben Mody Hospital, Ankleshwar, were produced at Exh.21. In the said medical case papers, it was not noted that the said history was narrated by the deceased at the time of her admission. On the contrary, the Doctor on duty had noted that, "there is no sign of injuries over body / two tooth loose. They told us that the deceased accidentally burnt by flame but could not give so we transfer to Baroda SSG Hospital." This endorsement of the Doctor on duty at Jayaben Mody Hospital, Ankleshwar, raises serious doubts about the information given to the Doctor that the deceased herself had informed the Doctor that she had sustained accidental burn injuries. In the said endorsement, the Doctor on duty had used the words "They told us". This shows that the information which was given to the Doctor on duty was not given by the deceased but by the in-laws who had accompanied the deceased to Jayaben Mody Hospital, Ankleshwar, and had got admitted her in the said hospital. The deceased, in her dying declaration, had also stated that after she had sustained burn injuries,

her in-laws had accompanied her to the hospital and got her admitted in the said hospital. Therefore, in our view, the endorsement made by the Doctor on duty of Jayaben Mody Hospital, Ankleshwar, in the medical case papers Exh.21 is not the first version of the deceased narrating about the manner in which she had sustained burn injuries. The history noted in the case papers Exh.21 appears to have been narrated by the relatives of the appellant who had accompanied the deceased at the time of her admission in the said hospital. Therefore, the said history which was not given by the deceased cannot be called a dying declaration of the deceased which was at the earliest point of time.

16. On receipt of the information about the deceased having sustained burn injuries, her brother, P.W.3, Maganbhai Gumanbhai Patel, had gone to Jayaben Mody Hospital, Ankleshwar, and enquired from the deceased how she had sustained burn injuries. The relatives of the appellant were requested to go out of room in which the deceased was getting treatment. On enquiry being made by P.W.3, Maganbhai, the deceased had narrated the entire incident and the manner in which she was set on fire. In our view, the oral statement made by the deceased had become dying declaration after her death in view of Section 32 of the Indian Evidence Act ('Act' for short).

17. On the advice of Jayaben Mody Hospital, Ankleshwar, the deceased was shifted to the Civil Hospital, Bharuch, She was admitted in the said hospital on June 11, 1993 around 5.30 p.m. P.W.5, Dr. Laxman Rathod, at the time of admission of the deceased in the hospital, had noted down the history as stated by the deceased in the case papers produced at Exh.31. Before P.W.5, Dr. Laxman Rathod, the deceased had stated that she had sustained burns due to pouring of kerosene by her husband and setting her on fire. The said history was noted in the case papers as under:
"Homicidal burns by her husband by kerocen (sic)."
The history narrated by the deceased before P.W.5, Dr. Laxman Rathod, had also become dying declaration on the death of the deceased which had taken place on July 9, 1993. The second dying declaration involves the appellant with the commission of the crime.

18. The brother of the deceased, P.W.3, Maganbhai Gumanbhai Patel, on receipt of information about the deceased having been admitted in Ankleshwar Hospital, had gone to the said hospital and had enquired from the deceased how she had sustained burn injuries. The

deceased had narrated how the incident had taken place. The said dying declaration also involves the appellant with the commission of the crime.

19. The fourth dying declaration recorded by P.W.4, M.R. Vasava, Executive Magistrate, Ankleshwar, had also supported the case of the prosecution that the appellant had poured kerosene on the deceased and set her ablaze. P.W.4, M.R. Vasava, on receipt of yadi from PSI, GIDC Police Station, Ankleshwar, had gone to Jayaben Mody Hospital, Ankleshwar, and had verified from the Doctor on duty that the deceased was in a fit statement of mind and having satisfied himself that the deceased was conscious and in a fit state of mind had started recording of dying declaration. Before recording dying declaration, P.W.4, M.R. Vasava, had taken all the precautions that no relative of the deceased was present during recording of declaration. Before P.W.4, M.R. Vasava, the deceased had narrated how the incident of setting her on fire had taken place. In the dying declaration, Exh.28, she had stated that when she was set ablaze, except the appellant, nobody was present in her house and when she was set on fire after pouring kerosene, she had raised shouts and, therefore, her brother-in-law, Narsinhbhai, who was residing in the neighbourhood, along with other neighbours, had rushed to the place of the incident and had poured water on her. The cause for setting her on fire by the appellant as stated by her was that on previous day as she had refused to give money to the appellant to buy liquor, she was physically beaten by fist and kick blows due to which her two tooth had become loose. In her dying declaration, the deceased had categorically stated that she had not sustained burn injuries due to accident but kerosene was poured on her body and she was set on fire. P.W.4, M.R. Vasava, after recording dying declaration, had obtained endorsement of the Doctor on duty that the patient was conscious and in a fit statement of mind to give her declaration. P.W.4, M.R. Vasava, was cross examined at length but nothing could be brought on record to dislodge his testimony. In our opinion, the dying declaration recorded by P.W.4, M.R. Vasava, satisfies our conscience that the said dying declaration is truthful and reliable.

20. All the four dying declarations, as discussed above, are consistent and get corroboration from the medical case papers Exh.21 of Jayaben Mody Hospital, Ankleshwar, which had supported the declaration made by the deceased that on the previous day of the incident she was physically belaboured by the appellant and, due to fist blows given on her face, her tooth had become loose.

21. It is a trite principle as laid down by the Apex Court in various decisions that conviction can be based on dying declaration if it satisfies conscience of the Court and if the Court finds that it is consistent, truthful and reliable. As observed earlier, all the dying declarations made by the deceased prior to her death were consistent, truthful and reliable which involved the appellant with the commission of crime. Therefore, the conviction recorded and the sentence imposed by the learned 2nd Additional Sessions Judge by the impugned judgment and order are required to be confirmed.

22. As a result of foregoing reasons, the appeal is dismissed. The conviction of the appellant under Sections 302 and 498-A of the Indian Penal Code and sentence imposed on him to undergo R.I. for life and fine of Rs.500 in default R.I. for six months for the offence under Section 302 of the Indian Penal Code and R.I. for one year and fine of Rs.200 in default R.I. for three months for the offence under Section 498-A of the Indian Penal Code, recorded by the learned 2nd Additional Sessions Judge, Bharuch, in Sessions Case No.217 of 1993, by judgment and order dated October 29, 1994, are hereby confirmed. The muddamal be destroyed in terms of directions given in the impugned judgment and order.

(M.H. Kadri, J.)

(M.C. Patel, J.)

(swamy)